United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-5013

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-5013

In The Matter of W. T. GRANT COMPANY,

Debtor-in-Possession

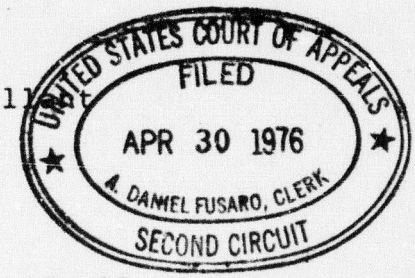
BALTIMORE GAS AND ELECTRIC COMPANY,

Petitioner-Appellant

-v-

W.T. GRANT COMPANY,

Respondent-Appellee



APPEAL FROM AN ORDER OF THE DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT

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BRIEF FOR PETITIONER-APPELLANT BALTIMORE GAS AND ELECTRIC COMPANY

INTRODUCTORY STATEMENT

Pursuant to 28 U.S.C. §1291, Baltimore Gas and Electric Company ("BG&E") appeals from an order of the District Court for the Southern District of New York, Constance Baker

Motley, District Judge, which sustained an order of Bankruptcy Judge John J. Galgay entered November 17, 1975.

The Bankruptcy Court Order appealed from denied BG&E's petition for an order requiring the debtor-in-possession W.T. Grant Company ("Grant") to provide a deposit equivalent to its estimated charges for two months service as a precondition to future electric and gas service, and enjoined BG&E from terminating service to Grant for non-compliance with this lawfully approved deposit request. In entering this order the Bankruptcy Court exceeded its statutory authority by compelling BG&E to extend new credit to the debtor, without jurisdiction over BG&E, and contrary to tariff provisions expressly sanctioned under valid Maryland law.

STATEMENT OF THE ISSUES

(1) Does a bankruptcy court in a Chapter XI proceeding have jurisdiction to compel a public utility to provide service to a debtor-in-possession on terms more favorable than those applicable to all other customers under tariffs authorized and approved by a state regulatory commission? BG&E submits that the answer is "no".

(2) Does a bankruptcy court in a Chapter XI proceeding have the authority to determine the amount of a security deposit payable by a debtor-in-possession as a condition precedent to continued electric service, where such action is

both substantively and procedurally inconsistent with valid state law and where §959(b) of 28 U.S.C. provides that a debtor-in-possession shall operate its business "according to the requirements of the valid laws of the State in which such property is situated." BG&E submits that the answer is "no".

STATEMENT OF THE CASE

This case arises out of an order of the Bankruptcy Court dated October 2, 1975, authorizing Grant to operate and manage its business as a debtor-in-possession pursuant to Chapter XI. The order included the following injunctive paragraph:

> "ORDERED that all persons, firms and corporations be and they hereby are, enjoined from disturbing or interfering with utility services, including, but not limited to, the furnishing of gas, electricity, water, telephone (present telephone numbers) or any other utility of like kind furnished by debtor and are hereby enjoined from cutting off or discontinuing any such utility or services to the debtor-in-possession except upon further order of this Court;..." (Joint Appendix, hereinafter "JA", at 27).

Since this Order was entered without notice to BG&E and was never formally served upon it, BG&E was unaware of the terms of the above paragraph. However, upon reading in the newspapers of Grant's authorization to operate as a Chapter XI debtor-in-possession, BG&E on October 6, 1975 advised Grant in writing that a deposit in the amount of $56,017 would be required as security for continued gas and electric service to the

Grant stores in BG&E's service area. (JA-34). Grant made no response, except to forward a copy of the Bankruptcy Court's October 2 order to BG&E. Thereupon, on October 20, 1975, Grant advised BG&E that the Bankruptcy Court had signed a supplemental order on that date which specifically prohibited BG&E from discontinuing electric and gas service to Grant and which stated that BG&E would be held in contempt and subjected to fines and penalties in the event it did discontinue service. (JA-42). The supplemental order of October 20, like the initial order of October 2, was entered summarily and without notice to or opportunity to be heard by BG&E.

On October 24, 1975 the Bankruptcy Judge signed, and BG&E served on Grant's counsel, an order to show cause and petition demanding (i) rescission of the Bankruptcy Court's orders of October 2 and October 20, 1975 to the extent they enjoined BG&E from discontinuing gas and electric service, and (ii) that Grant be required to put up a two month deposit in the amount of $56,017 for continuance of gas and electric service to Grant's stores within BG&E's service area. (JA-31). The matter came on for hearing on October 29, at which time Grant, by the affidavit of its Vice President and General Counsel, took the position that no deposit should be required, and that Grant, as a debtor-in-possession, need not comply with BG&E's tariffs or the regulations of the Maryland Public

Service Commission. In essence, Grant's position was that its status as a debtor-in-possession permitted it to disregard the deposit request.

After hearing counsel on October 29, the Court adjourned the matter for one week, with a request that the parties attempt to come to terms. Those efforts were unsuccessful, and, on November 5, 1975, Bankruptcy Judge Galgay ruled that Grant should make a deposit equal to one month's service, in the manner prescribed in his decision in In the Matter of Hartfield-Zodys, Inc., No. 74 B 1633 (S.D.N.Y., March 12, 1975). An order to this effect was settled and entered on November 17. (JA-118).

On November 19, 1975 BG&E filed a Notice of Appeal from the Bankruptcy Judge's decision pursuant to Bankruptcy Rule 806. (JA-123). This appeal was submitted to District Judge Motley of the Southern District on February 10, 1976. On February 13, 1976, prior to the decision of the District Court, the Bankruptcy Court issued an order terminating Grant's Chapter XI proceedings and giving it 60 days to liquidate its business. On February 20, 1976 Judge Motley issued an opinion affirming the order of the Bankruptcy Court. (JA-129). The District Court in its opinion of February 20, 1976 found that BG&E's appeal "is not moot because it presents an issue

which is capable of repetition yet evading review." This appeal was subsequently taken by Notice of Appeal filed on March 3, 1976. (JA-144).

STATEMENT OF THE FACTS

BG&E is a public service company organized under the laws of the State of Maryland. It supplies gas and electricity within its franchised service area in Maryland in accordance with the regulations of the Maryland Public Service Commission and pursuant to its tariffs filed with that Commission (JA-33). At the time of Grant's application of October 2, 1975, BG&E was supplying electric service to seven Grant stores located within its service area, and was supplying gas service to certain of these stores. The monthly billings in connection with this service had averaged $28,000 per month during the months preceding Grant's application of October 2, 1975 (JA-34).

Because it is a public service company, BG&E is obligated to provide electric and gas service on a non-discriminatory basis to all customers in its service area, under terms and conditions set forth in tariffs filed with and approved by the Maryland Public Service Commission. A regulated utility thus does not enjoy the same freedom as a non-regulated corporation, such as Grant or its suppliers,

to refuse to provide service because of a customer's poor credit rating. Accordingly, the right of BG&E's customers to demand continued electric and gas service is conditional upon their reciprocal obligation to abide by the terms and conditions of service set forth in BG&E's tariffs.

These terms and conditions are subject to regulation by the Maryland Public Service Commission, which is an expert administrative body charged with the responsibility of balancing the rights of BG&E's customers to continued utility service at reasonable rates and terms, against the needs of BG&E.* Rates and terms of service must be fixed at a level which provide adequate revenues to permit BG&E to successfully attract the capital it requires to meet its service obligations. Such rates and terms of service necessarily apply without preference or discrimination to all customers of the utility, to insure that both the advantages and the burdens implicit in regulated utility service are shared equally by all. Since the operating experience of the Company during a "test" year is the basis of the Commission's rate determination, a shortfall in return resulting from uncollectible accounts during the test year will be reflected in correspondingly higher rates

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* Ann. Code of Md., Art. 78, §69(a).

to all customers. Therefore, losses suffered by BG&E on the Grant account may be borne by the ratepaying public, which includes many low and middle income consumers who are even now hard pressed to pay for essential electric and gas service.

Accordingly, to protect utilities and their solvent customers from loss, the Maryland Public Service Commission has promulgated the following regulations which permit a utility to require any financially unsound customer to provide a deposit equivalent to the maximum estimated charges for two consecutive monthly billing periods as security for payment:

> "4.2.1. Permission to Require Deposit. Each utility may require from any customer a deposit to be applied against any unpaid balance of the utility for service at the time service shall terminate".
>
> "402. Each utility may require from any customer or prospective customer a deposit intended to guarantee payment of bills for service".

Commission regulations also provide that a customer who fails to satisfy his obligation to put up a lawfully demanded deposit forfeits his right to continued service:

> "406. Reasons for Denying Service. Service may be refused or discontinued for any of the reasons listed below...: (10) For failure of the customer to provide the utility with a deposit as authorized by Rule 402".

The duly filed tariffs of BG&E include at Section 7.6 a provision permitting BG&E to require of any electric customer a cash deposit of not more than the maximum estimated charges for two consecutive billing periods, and at Section

2.4(c) a provision allowing BG&E to terminate service when a requested deposit is not provided:

> "7.6 Customers' Deposits: The Company may require from any Customer or prospective Customer a cash deposit, determined in accordance with the applicable regulations of the Commission and the applicable rules or practices of the Company, intended to guarantee payment of final bills. Such deposit shall be not less than $5 nor more in amount than two-twelfths of the estimated charge for the ensuing 12 months for residential service, nor more than the maximum estimated charge for two consecutive billing periods for nonresidential service or as may be reasonably required by the Company in cases involving service for short periods or special occasions. Simple interest on deposits at the rate of 6% per annum is paid by the Company to each Customer making such deposit for the time the deposit is required by the Company, provided, that no interest is paid unless the deposit is held longer than 90 days. Payment of the interest to the Customer is made annually if requested by the Customer, or at the time the deposit is refunded."

> "2.4 Refusal or Discontinuance of Supply for Cause: The Company may refuse or discontinue service ... for any of the following reasons:
>
> * * *
>
> (c) Customer's failure to provide a deposit to insure payment of bills, when requested by the Company under the provisions of Sec. 7.6."

BG&E's gas service tariffs contain identical provisions at Sections 7.6 and 2.4(c), respectively.

Obtaining a deposit is particularly important in the case of a bankrupt or Chapter XI customer. Utilities peatedly experience substantial losses in the cases of such customers, even where a two month deposit is paid. Such loss

results when the debtor-in-possession is ultimately liquidated despite efforts at rehabilitation. Typically the debtor will fall behind in its payments, resulting in an amount owing greatly in excess of the deposit (JA-56).

BG&E's demand of October 6, 1975 that Grant provide it with a security deposit in the amount of two months average billings was based on Grant's uncertain financial condition. As of October 2, 1975 Grant's total liabilities of $1,030,556,198 exceeded its total assets of $1,016,776,243 by some $13.8 million (JA-12, 13). The affidavit of Grant's President, Robert H. Anderson, submitted in support of Grant's October 2 Petition for authorization to operate and manage its business as a debtor-in-possession disclosed that:

> "The effect of such losses was to discourage many suppliers from extending credit and ultimately to refrain from shipping goods to [Grant] upon any terms despite repeated attempts by [Grant]...to induce suppliers to ship goods to [Grant]" (JA-19; emphasis supplied).

Thus BG&E's decision to seek a deposit as security for future payment was not different from the collective business judgment of thousands of Grant suppliers, representing a large segment of American business, that Grant was so unstable financially that they had no alternative but to stop supplying Grant, except upon a straight cash basis.

SUMMARY OF ARGUMENT

As a result of the order appealed from, BG&E found itself virtually singled out from among Grant's many thousands of former suppliers and compelled to furnish valuable service to Grant on credit terms set by the Bankruptcy Court. BG&E maintains, however, that its tariffs give it the exclusive right to determine the appropriateness and amount of deposit to be supplied by non-credit monthly customers, subject to review by the Maryland Public Service Commission.

This appeal thus involves a clearly defined legal issue: the authority of the Bankruptcy Court summarily to set the terms on which a utility shall supply service to a debtor-in-possession. BG&E will show that the Bankruptcy Court's attempt to exercise such summary authority exceeds its statutory jurisdiction and violates the express Congressional mandate that valid state law shall control the post-filing operation and management of the debtor-in-possession's business. Specifically, BG&E will show that the order complained of exceeded the authority of the Bankruptcy Court in the following respects:

1. The Bankruptcy Court lacked statutory jurisdiction to determine summarily the conditions on which utility service should be provided to Grant, or to enjoin the termination of such service. Both the Bankruptcy Court and the District

Court disregarded the law of this Circuit, which is that future utility service to a debtor-in-possession is not property of the debtor subject to protection by injunction of bankruptcy court, (Point I.A., infra, p. 13) and that the equitable powers of a bankruptcy court cannot provide primary jurisdiction where jurisdiction over the debtor's property is lacking (Point I.B., infra p. 20).

2. The Bankruptcy Court had no authority to relieve the debtor-in-possession of either its statutory obligation to meet BG&E's lawfully sanctioned deposit request or its duty to seek inital review of that request in the proper forum, the Maryland Public Service Commission. Since BG&E's deposit requirements are authorized by valid Maryland law and are equally applicable to all customers of BG&E, including debtors-in-possession, the order appealed from violated the mandate of 28 U.S.C. §959(b), which provides that:

> "...a debtor in possession, shall manage and operate the property in his possession...according to the requirements of the valid laws of the State in which such property is situated..."

Said order also violated Section 959(b) by usurping the primary and exclusive jurisdiction of the Maryland Public Service Commission to pass on the appropriateness and amount of a requested deposit.

I. THE BANKRUPTCY COURT HAD NO JURISDICTION TO COMPEL BG&E TO PROVIDE SERVICE TO GRANT ON TERMS MORE FAVORABLE THAN THOSE APPLICABLE TO OTHER CUSTOMERS OF BG&E.

The District Court concluded that the Bankruptcy Court had jurisdiction to determine terms and conditions of future electric and gas service to a debtor-in-possession under Sections 311 and 2(a)(15) of the Bankruptcy Act. (Slip opinion, pp. 7-8; JA-135, 136). In reaching this conclusion, the District Court chose to ignore the rule of this Circuit set forth by this Court in Slenderella Systems of Berkeley, Inc. v. Pacific Telephone and Telegraph Co., 286 F.2d 488 (2d Cir. 1961). Slenderella expressly held that a debtor's interest in future utility service does not give a bankruptcy court jurisdiction to set terms and conditions of such service under either of the theories relied on by the court below.

A. Future Utility Service Is Not Property Of The Debtor, And Is Therefore Not Subject To The Jurisdiction of The Bankruptcy Court

The Bankruptcy Court's authority to compel continued service by BG&E to Grant and to determine unilaterally terms and conditions of such service must be found, if it is to be found at all, in the Bankruptcy Court's express statutory power to enjoin interference with the debtor's property pursuant to Section 311 of the Bankruptcy Act, 11 U.S.C. §711. This section provides in full as follows:

> "Where not inconsistent with the provisions of this chapter, the court in which the petition is filed

> shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property wherever located."

The controlling precedent in this Circuit holds that future public utility service does not constitute "property" of the debtor within the meaning of Section 311. The Bankruptcy Court therefore lacked jurisdiction to set the terms and conditions of such service. In Slenderella Systems of Berkeley, Inc. v. Pacific Telephone and Telegraph Co., supra, this Court, per Judge Moore, rejected the contention of a group of Chapter XI debtors that the referee had jurisdiction to enjoin the defendent utility from terminating or altering the terms of existing utility service. The defendant utility in Slenderella had announced its intention either (1) to terminate the debtors' telephone service or (2) to continue such service at new numbers, unless the debtors paid their outstanding pre-filing telephone bills. 286 F.2d at 489. Upon petition of the debtors, the referee issued an order enjoining the telephone company from interfering with the alleged right of the debtors to continue receiving calls made to their old numbers. The referee's order was reversed by the District Court on appeal, In the Matters of Slenderella Systems of Berkeley, Inc., 190 F. Supp. 886 (S.D.N.Y., 1960).

The Second Circuit sustained the reversal on the grounds that the debtors had no property rights in either

continued utility service or particular telephone numbers. As to the first contention, which is indistinguishable from that made by the debtor herein, this Court stated:

> "Appellants also contend that their contract rights to continued service amount to property within the meaning of Section 311 of the Bankruptcy Act. But if the debtors are to have recourse for a violation of a contract right, it must be by way of a plenary action. Where a substantial issue of law or fact exists as to title, and where the debtor was not in physical possession of the property on the date of filing his petition, the rights under the contract should not be settled in a summary proceeding. See In re Roman, 2 Cir., 1928, 23 F.2d 556; cf. Matter of Wire Corp. of America, D.C.D.N.J. 1955, 131 F.Supp. 586; In re Meiselman, 2 Cir., 1939, 105 F.2d 995, 997. Thus, there being no property of the debtor involved in this controversy, the Bankruptcy Court does not have summary jurisdiction." 286 F.2d at 490 [emphasis supplied.]

Thus it is the holding of Slenderella that a debtor seeking to enforce alleged contract rights must proceed by a "plenary" adjudication in the same forum available to all other commercial litigants; the quoted passage makes clear that a bankruptcy court lacks jurisdiction to determine such rights in the first instance. The Slenderella court thereby recognized the controlling principle that bankruptcy court jurisdiction is limited by statute, as well as its corollary that such jurisdiction does not extend to every dispute which in any way might affect the debtor, its bank account or its ultimate rehabilitation.

The Ninth Circuit reached an identical conclusion on very similar facts in In re Best Re-Manufacturing Co.,

453 F.2d 848 (9th Cir. 1971), cert. den. sub nom. Rothman v. Pacific Telephone and Telegraph Co., 406 U.S. 919 (1971). In Best the referee refused to enjoin a telephone company from changing the debtor's number, despite the debtor's allegation that continued service at the old number was necessary to the success of the reorganization. The Ninth Circuit affirmed on appeal, concluding that a telephone number is not "property", nor is a right to its continued use "possessed", within the meaning of Section 311.* Relying on Slenderella, the Ninth Circuit held that the debtor's alleged right to continued telephone service of any kind was not "property" over which the reference could exercise its jurisdiction.

It is the position of BG&E that this Circuit's decision in Slenderella is determinative of the instant appeal, and that the Bankruptcy and District Courts committed clear and reversible error in disregarding it. The Slenderella opinion unambiguously states the rule of this Circuit that alleged rights to continued utility service cannot constitute property of the debtor within the meaning of Section 311, and that accordingly a bankruptcy court cannot summarily set

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* Of course, both Slenderella and Best implicitly recognize the indisputable principle that utility service remains property of the supplying utility until the customer takes physical possession of it after it passes through his meter. It is even more clear that Grant cannot assert ownership of gas or electricity in the possession of BG&E.

the terms and conditions of such service or enjoin its termination.

The District Court below, unable to overrule Slenderella, sought to distinguish it. Judge Motley acknowledged that:

> (1) the Court of Appeals in Slenderella has determined that alleged contract rights to continued service are not property within the meaning of the Bankruptcy Act, and therefore cannot form the basis for the Bankruptcy Court's summary jurisdiction (JA-139); and
>
> (2) "the [Slenderella] court held that the debtor by the express terms of its contract with the utility had no property right to the number and, consequently, no property of the debtor was involved in that case over which the Bankruptcy Court could exercise its summary jurisdiction" (JA-139).

The District Court nonetheless concluded that Slenderella "is not controlling authority" (JA-138), stating only that:

> "Judge Galgay ruled in Hartfield-Zodys that the property before him was the debtor's bank accounts. Such property of the debtor is plainly within the contemplation of §711." (JA-139)

The teaching of Slenderella is that a bankruptcy court cannot exercise jurisdiction over a utility providing service to the debtor because the future utility service does

not constitute property of the debtor within the court's jurisdiction. Nonetheless, the District Court apparently held that the debtor's bank account could serve as alternate basis of summary jurisdiction over a utility seeking to obtain a deposit for service.

Such a theory of jurisdiction simply cannot be maintained. It conflicts directly with the holding of Slenderella. Quite clearly the alteration of telephone service on threat of termination permitted by this Court in Slenderella had an adverse impact on the bank account of debtors there involved, comparable to the alternatives of termination or payment of a deposit by Grant in the instant case. Under Judge Motley's theory, the powers of a bankruptcy court over persons dealing with a debtor would be virtually limitless, since a debtor's bank account would be affected by satisfaction of any obligation, as well as by the third party's withdrawal from virtually any pre-existing commercial relationship. This is tantamount to a requirement that all disputes between a debtor and any third party with whom it deals be determined by the bankruptcy court according to statutory standards intended to apply only to protect the debtor from its pre-filing creditors. This is not, and cannot be, the law. As the Supreme Court stated in Calloway v. Benton, 336 U.S. 132, 142 (1949), "...Congress did not give the bankruptcy court exclusive jurisdiction over

all controversies that in some way affect the debtor's estate," even where their disposition might present cause a "serious practical problem" to the administration of the debtor's estate.

In fact, the jurisdictional theory advanced by Judge Motley below has been expressly rejected by the Third Circuit in In re Dolly Madison Industries, Inc., 504 F.2d 499 (3d Cir. 1974). In Dolly Madison a Chapter X debtor sought an injunction permitting it to continue to operate in Virginia despite revocation of its certificate to do business there for failure to file the required fees and informational return. The debtor argued, just as the District Court did below, that the jurisdiction of the Bankruptcy Court could be founded on the impact on the debtor's assets of compliance with state law. The Third Circuit found no merit in this claim:

> "The trustee points to DMI's Blackstone, Virginia manufacturing plant as the res required for the exercise of summary jurisdiction by the district court. The trustee then argues that revocation of the certificate of authority deprives DMI of the right to operate that plant; thus, constituting an interference with "property" within the jurisdiction of the reorganization court. We do not believe, however, that the scope of a bankruptcy court's summary jurisdiction is as broad as the trustee suggests.
>
> "In the instant case, the reoganization court has not acted to preserve its power to adjudicate claims relating to the trustee's property. Unlike the situation in which a bankruptcy court enjoins prosecution of a claim in a different forum, here the SCC has made no claim against "property" of the debtor corporation. The mere fact that the

> debtor's property may be affected by state law does not constitute a "claim" against that "property" and absent such a "claim" summary jurisdiction is unavailable." 504 F.2d at 503-504 [footnotes omitted].

The error of the District Court's refusal to follow Slenderella is further emphasized by its failure to cite persuasive authority in support of its attempted distinction of that decision. The District Court contents itself with citing Bankruptcy Judge Galgay's bold assertions of jurisdiction in Hartfield-Zodys as authority for sustaining precisely those claims on appeal of the instant order, which was itself based exclusively on Judge Galgay's decision in Hartfield-Zodys. For example, the District Court's conclusion that the Bankruptcy Court's jurisdiction over BG&E may be based on protection of Grant's bank account (JA-135, 136) rests only on a citation of unsupported language in Judge Galgay's Hartfield-Zodys opinion. Since the portion of Judge Galgay's earlier opinion cited by Judge Motley contains no authorities supporting the jurisdictional theory asserted therein, the District Court has in effect cited Judge Galgay on Judge Galgay as grounds for rejecting Slenderella.

B. The Equitable Powers Of The Bankruptcy Court Cannot Serve As An Independent Basis Of Jurisdiction

The District Court apparently concluded that the Bankruptcy Court's jurisdiction could be based on its general

equitable powers under Section 2(a)(15) of the Bankruptcy Act.* Again the District Court cited no meaningful precedent on this point; instead, it simply repeated Judge Galgay's assertions of his own authority in Hartfield-Zodys.

BG&E submits that in view of this Circuit's clear and dispositive treatment of this issue in Slenderella, there is no basis for this conclusion. In Slenderella, supra, this Court expressly held that neither the general equitable jurisdiction of the bankruptcy courts nor the equitable powers conferred by Section 2(a)(15) provide an independent basis for summary jurisdiction over the provision of utility service to a debtor-in-possession, unless there is also jurisdiction over the property of the debtor under Section 311. Thus,

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* Section 2(a), 11 U.S.C. 11(a), provides in relevant part:

> "(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to --
>
> * * *
>
> "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title...".

after concluding at 490 that "there being no property of the debtor involved in this controversy, the bankruptcy court does not have summary jurisdiction," the Slenderella Court stated:

> "Section 2(a)(15) of the Bankruptcy Act and Section 1651 of Title 28, U.S.C.A. does not change this result for those sections only broaden the remedial devices available to the court once it has jurisdiction. They do not give the bankruptcy court the authority to deal with creditors where property of the bankrupt is not involved. In re Adolf Gobel, Inc., supra, 80 F.2d at pages 852, 853." 286 F.2d at 490. [emphasis added]

Other federal courts have consistently held that the equitable powers of a court of bankruptcy exist only in aid of its primary jurisdiction. For example, in Monte Vista Lodge v. Guardian Life Insurance Company of America, 384 F.2d 126 (9th Cir. 1967), cert. denied 390 U.S. 950 (1968), the debtor appealed from an order of the Bankruptcy Court dissolving an injunction previously granted against a mortgage foreclosure pending on the debtor's property. The Court of Appeals rejected the debtor's argument that the original injunction was a proper exercise of the Bankruptcy Court's general equitable jurisdiction under Section 2(a), stating:

> "[N]either the inherent equity powers of the court nor Section 2(a)(15) can permit a bankruptcy court to act beyond its primary jurisdiction. Section 263 eliminates the property described from the authority of the bankruptcy court in a Chapter X proceeding, and it therefore has no power to protect nonexistent jurisdiction." 384 F.2d at 129.

The Fifth Circuit reached a similar conclusion in In re Texas Consumer Finance Corp., 480 F.2d 1261 (5th Cir. 1973), in which it held that the equitable powers of the Bankruptcy Judge in a Chapter XI proceeding do not give him jurisdiction to order that preferred shareholders of the debtor surrender their certificates for cancellation. The Court stated that "[u]nder Chapter XI the Bankruptcy Court's jurisdiction is limited to the 'debtor and his property, wherever located,'" and therefore concluded that the equitable powers of the Court provided no independent basis of jurisdiction:

> "The Bankruptcy Court is guided by equitable doctrines and principles, but only insofar as they are consistent with the Bankruptcy Act. See American United Mutual Life Ins. Co. v. City of Avon Park, Florida, 311 U.S. 138, 61 S.Ct. 157, 85 L.Ed. 91 (1940); Taubel-Scott-Kitzmiller Co., Inc. v. Fox, 264 U.S. 426, 44 S.Ct. 396, 68 L.Ed. 770 (1923); In Re Ross Sand & Gravel, Inc., 289 F.2d 311 (6th Cir. 1961); Evarts v. Elroy Gin Corp., 204 F.2d 712 (9th Cir. 1953). The equity jurisdiction conferred by the Act merely empowers the Referee to employ the principles of equity in the exercise of this statutory jurisdiction. Jurisdiction of the Bankruptcy Court is framed by statute according to the particular proceeding involved under the Bankruptcy Act, and the Bankruptcy Court's exercise of its equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act." 480 F.2d at 1265.

Furthermore, the assertion that the Bankruptcy Court may rest its jurisdiction on general equitable powers, independent of the supervisory authority over the debtor's property

accorded by Section 311, conflicts with the unambiguous requirements of 28 U.S.C.A. 959(b).* The Bankruptcy Court's general equitable powers cannot be the source of authority to supercede express Acts of Congress, since the equitable jurisdiction of the Backruptcy Court is ancillary and not primary.

The sole decision cited below in support of a contrary proposition is actually no more than an application of traditional power of a bankruptcy court to enjoin preferential satisfaction of a pre-filing debt. In Re Lawrence Products Co., 211 F.Supp. 301 (D. Ala. 1962), cited below at Slip Opinion p. 8 (JA-136), involved an attempt by one of the debtor's pre-filing creditors to gain an illegal preference as to a scheduled debt offer the debt had been settled pursuant to an order confirming the debtor's plan of arrangment. Under those circumstances, the bankruptcy court's equitable powers were properly exercised to protect the debtor's estate from a transaction expressly prohibited by the Bankruptcy Act. This is a far cry from compelling a utility which seeks no preferential payment of its pre-filing claims to extend additional credit to the debtor in the interests of its possible rehabilitation.

A bankruptcy court's equitable powers must be strictly limited. The theory adopted below would give the bankruptcy

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* See discussion infra, p. 26 et seq.

court the power to compel continued extensions of credit by any lender or supplier on terms dictated by the bankruptcy court. For example, if continued utility service is important to a Chapter XI debtor's rehabilitation, the availability of bank credit on reasonable terms is even more crucial. Nonetheless, it cannot reasonably be contended that a bankruptcy court has the power to compel a lending institution to maintain existing lines of credit to a debtor, or to refinance prefiling loans at a rate of interest found "reasonable" by the bankruptcy court. Nor can it be seriously maintained that a bankruptcy court, recognizing the debtor's need for a continued flow of merchandise, can order the debtor's previous suppliers to continue shipments on terms set by the bankruptcy court to facilitate the debtor's rehabilitation. Clearly, any such actions would exceed the bankruptcy court's jurisdiction, regardless of whether or not they protected the debtor's bank account or contributed to its chances for successful reorganization.

It has been suggested that BG&E's status as a regulated monopoly somehow distinguishes it from other persons dealing with the debtor. Any such argument has been definitively rejected by Slenderella, which as shown supra at p. 14 et seq. strictly limits the power of the bankruptcy court to deal summarily with terms of utility service. The fundamental principle applied by Slenderella is that alleged contractual

rights of the debtor against any third party must be decided in the usual forum for determination of such disputes rather than in the bankruptcy court. In the case of a regulated utility, that forum is the Public Service Commission, which is an expert body created to balance the rights and obligations of a regulated utility and its customers. Under Slenderella the Bankruptcy Court is precluded from usurping this statutory function. Therefore Grant's interests as a customer of BG&E must be determined initially by the Maryland Public Service Commission, with full opportunity for judicial review, in the same manner as the interests of any other BG&E customer are determined;* under Slenderella the Bankruptcy Court has no jurisdiction to make its own independent determination of these issues.

II. THE BANKRUPTCY JUDGE EXCEEDED HIS AUTHORITY IN RELIEVING GRANT OF ITS STATUTORY DUTY TO OPERATE ITS BUSINESS IN ACCORDANCE WITH VALID STATE LAW

A. Congress Has Provided That A Debtor-in-Possession Must Operate Its Business Under The Same Standards Applicable To All Other Businesses

Congress has expressly stated that a debtor-in-possession shall enjoy no special privilege to evade state

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* Under the law of Maryland, any objection to the amount or appropriateness of BG&E's demand for a deposit must be raised initially with the Commission, pursuant to Annotated Code of Maryland, Art. 78, §77. Spintman v. Chesapeake & Potomac Telephone Co., 254 Md. 423, 428, 255 A.2d 304, 307 (1969); see infra, pp. 41-42.

law obligations incurred in the operation and management of its business. In doing so, Congress has made explicit that the jurisdiction of the bankruptcy courts does not extend to setting terms of third parties' ongoing commercial relationships with the debtor-in-possession.

The controlling statute, 28 U.S.C.A. §959(b), provides:

> "A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

Under the unambiguous words of this statute, the debtor-in-possession must comply with BG&E's deposit request or be subject to termination of service, since BG&E's right to a deposit is set forth in its duly approved tariffs, which have been expressly approved by the Maryland Public Service Commission and have the force and effect of law in the State of Maryland. Furthermore, compliance with valid state law in this case requires that the debtor-in-possession raise any objections to BG&E's request for a deposit before the Maryland Public Service Commission rather than in the Bankruptcy Court, "in the manner that the owner or possessor [of the Grant business] would be bound to do...." Thus the order complained of violated "the requirements of the valid laws" of Maryland within the meaning of Section 959(b) in two distinct respects:

1) the Bankruptcy Court excused the debtor from compliance with deposit requirements expressly approved by a legislative authority of the State of Maryland; and,

2) the Bankruptcy Court excused the debtor from exhausting the exclusive remedy provided by Maryland law for resolution of disputes between a utility and its customers, namely, resort to the informed discretion of the Maryland Public Service Commission.

Section 959(b) in effect gives statutory expression to the jurisdictional limitation set forth by this Circuit in Slenderella -- the power of a Bankruptcy Court to exercise its summary jurisdiction over third parties exists only to protect "property" of the debtor from its pre-filing creditors in the interests of securing an arrangement of scheduled debts. As Slenderella makes clear, other disputes involving the post-filing "management and operation" of the debtor's business, unrelated to claims on property of the debtor, must be determined through "plenary" adjudication under "valid laws of the state," "in the same manner that the owner or possessor thereof would be bound to do" if not in reorganization.

In Chemical Lime Co. v. West Penn Power Co., 24 F. Supp. 217 (M.D. Pa., 1938) a federal district court reached precisely this conclusion in refusing to enjoin the defendant utility from terminating electric service to a debtor which

had refused to comply with the utility's demand for a deposit. Noting that the utility's right to a deposit was set forth in both its duly filed tariffs and the regulations of the Pennsylvania Public Utility Commission, the court analyzed the rights and obligations of the debtor as follows:

> "It is not for this Court to say that the Statutes of Pennsylvania and the regulations of its administrative tribunals are improper, or that they are being disobeyed. It is true that the Plaintiff is under the supervision of this Court, and the money demanded by Defendant is in Custodia Legis. But I cannot conclude that, for that reason alone, this Court should proceed to a determination of the propriety of the demands of a Pennsylvania public utility, which demands are admittedly in accordance with the laws of the State. To do so would, in effect, set up one law to be applied to corporations doing business under the supervision of the Bankruptcy Court different from that which must be applied to corporations operating independently of the Court. The Defendant, as a corporation doing business with the Plaintiff, deals with it at arm's length. Except for the fact that it is subject to regulation as a public utility it could do business with Plaintiff or refuse to do business with it or do business on whatever terms it might be able to impose. Being a public utility, however, the terms it may impose are governed by law which is administered by the Pennsylvania Public Utility Commission. It follows that the proper tribunal to pass upon the propriety of its demand in this case is the Commission. This Court is without jurisdiction and therefore, the Bill must be dismissed." (24 F.Supp. at 219-20); [emphasis added].

The emphasized sentence foreshadows Slenderella in requiring that a dispute as to continued utility service be determined in a "plenary" adjudication under generally applicable state law, instead of in the bankruptcy court.

The Supreme Court has repeatedly made clear that the requirement of compliance with state law extends to the bankruptcy court as well as its trustee, receiver or debtor-in-possession, regardless of the effect of compliance on the reorganization of the debtor. For example, in Gillis v. California, 293 U.S. 62 (1934), a refinery corporation in reorganization was unable to obtain a surety bond required by California law of all gasoline distributors. Like Grant, the receiver sought and obtained from the referee an order excusing compliance with the bond requirement on the grounds that the purpose of the reorganization would be frustrated by compliance with the statute. The Ninth Circuit reversed, State of California v. Gillis, 69 F.2d 746 (9th Cir. 1934). On review, the Supreme Court stated the question as follows: "The ultimate inquiry is whether Congress can withhold from the District Court the power to authorize receivers in conservation proceedings to transact local business, contrary to state statutes obligatory on all others." The Supreme Court then found that 959(b) prevented the referee from excusing the debtor from legislatively imposed obligations necessarily incurred in the operation of its business, even if the reorganization were frustrated as a result. The Court stated:

> "Whatever may be the inherent power of a court incident to a grant of jurisdiction there seems no ground whatever for saying that Congress cannot withhold or withdraw from courts of equity the right

to empower receivers in conservation proceedings to disregard local statutes." 293 U.S. at 66.

Several years later, in Palmer v. Massachusetts, 308 U.S. 79 (1939), the Supreme Court again held that Congress has expressly denied bankruptcy courts the power to authorize action by the debtor in disregard of state law. In Palmer, the district court had unilaterally permitted a railroad in reorganization to abandon eighty-eight passenger stations in Massachusetts despite the pendency of hearings before the State Department of Public Utilities on the debtor's abandonment petition. The Supreme Court affirmed the First Circuit's reversal, concluding that the district court had no jurisdiction to protect the debtor from the state proceedings pursuant to either its control over "the debtor and its property wherever located" or its power "to operate the business of the debtor."

Recently the Third Circuit likewise concluded that a bankruptcy court is powerless to excuse compliance with obligations incurred in the operation of the debtor's business, even where compliance will frustate the debtor's rehabilitation. The issue in In re Dolly Madison Industries, supra, was the power of the Bankruptcy Court to permit a debtor-in-possession to continue to do business in Virginia despite the revocation of the debtor's license to do business for failure to file the required fee and informational return. The Third Circuit concluded that the Bankruptcy Court had no such power, despite

the fact that reversal of the order of the Bankruptcy Court would force the debtor's Virginia plant to cease operation.

Despite the overwhelming weight of authority to the contrary, the District Court below erroneously concluded that the Bankruptcy Court enjoys the power to excuse compliance by the debtor with its obligations under state law because of either the deleterious effect of such compliance on the debtor's chances for successful reorganization or a supposed conflict with the Supremacy Clause. On the contrary, the above decisions make clear that: (1) the effect of compliance on the debtor does not give the Bankruptcy Court power to disregard obligations under state law, and (2) there is no conflict between the Supremacy Clause and generally applicable laws and regulations governing the debtor's post-filing operations.

1. Hardship to be suffered by the debtor-in-possession cannot justify preferential treatment which allows the debtor to avoid its obligations under state law. This point is made perfectly clear by the decisions cited herein. In case after case the courts have heard predictions of catastrophe if compliance is not excused, but have nonetheless found such speculation irrelevant to the statutory jurisdictional question before them. For example, in Gillis the Supreme Court rejected

the debtor's contention that compliance would mean that it "must cease receivership operations," stating:

> "And if the receiver cannot continue to carry on the Company's business according to the plain direction of Congress, he must pursue some other course permitted by law." 293 U.S. at 66.

Similar reasoning is implicit in the decisions of this Circuit in Slenderella, as well as that of the Third Circuit in Dolly Madison: the rule of these decisions is that debtor-in-possession must comply with any lawful requirements arising from continued operation of its business, regardless of the consequences.

Even in In re Penn-Central Transportation Co., 467 F.2d 100 (3d Cir. 1972), which was cited below for the proposition that a bankruptcy court may enjoin a utility company from obtaining a deposit from a debtor in order to preserve its assets and facilitate its rehabilitation, the Court of Appeals expressly noted that Section 959(b) might well preclude bankruptcy court interference if the utility were to resort to its state law remedies. Thus the Third Circuit's opinion expressly acknowledged that:

> "Indeed, section 959(b) of title 28, United States Code, explicitly requires "[A] trustee. . . appointed in any cause pending in any court of the United States. . .[to] manage and operate the property in this possession. . .according to the requirements of the valid laws of the State in which such property is situated. . ." [emphasis added]." 467 F.2d at 103.

The comment must be taken as dicta, of course, since the utility had only requested a deposit without resorting to its legal right to terminate service; therefore the order of the bankruptcy court in Penn-Central presented no conflict with any valid state law. Indeed, the Third Circuit emphasized this distinction in its opinion:

> "But no state law is violated by the refusal of the Penn Central trustees to make a deposit to secure future utility bills. New York law sanctions appellant's action in calling for a deposit but does not purport to make the customer's refusal of the demand an actionable wrong. Here again, it is only when appellant shall seek to discontinue service in reliance on a privilege claimed under state law that issue can be joined on the matter of obeying state law. [footnote omitted, emphasis added]." 467 F.2d at 103.*

In view of the later decision of the Third Circuit in Dolly Madison it is reasonable to assume that the Penn-Central court would have sustained the utility's right to terminate service for refusal to pay a lawfully demanded deposit, had the utility taken such an action. At the very least, it is clear that Penn-Central cannot be read to excuse compliance with state law wherever such compliance would be inconvenient to the debtor. To the extent that dicta of the District Court in

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* In addition, it should be noted that the plaintiff in Penn-Central did not challenge the Bankruptcy Court's jurisdiction under Section 311 to issue orders involving continued utility service, nor was this crucial issue passed upon in the opinions of the District Court or the Court of Appeals.

Penn-Central may imply the contrary, such an implication has been inferentially overruled by the more recent decision of the Third Circuit in Dolly Madison. Furthermore, if the asserted precedent of Penn-Central has any surviving validity it is not the law of this Circuit and should be rejected by this Court in favor of its own decision in Slenderella.

2. There can be no basis for suggesting that BG&E's deposit rights conflict with the Supremacy Clause. Since Congress has expressly provided in Section 959(b) that state law shall apply to the operation and management of a debtor-in-possession, there is no contrary federal policy with which BG&E's state law rights can conflict. Furthermore, even assuming that a conflict between 959(b) and a valid state law could exist, a non-discriminatory deposit requirement based on standards which are equally applicable to all BG&E customers is not the type of state law which could be found to frustrate the policy of the Bankruptcy Act.

The existence of Section 959(b) is in itself dispositive of any Supremacy Clause argument. Congress, through Section 959(b), has explicitly stated its intent that in the operation of its business a debtor-in-possession shall be subject to all obligations approved under state law. Since Congress, the source of the bankruptcy power, has made this policy part of the bankruptcy law, there can be no question of conflict with the Supremacy Clause.

In any event, the BG&E deposit tariff satisfies the Supremacy Clause even without the express protection of Section 959(b). In this respect, the reliance of the District Court on Perez v. Campbell, 402 U.S. 637 (1971) is completely misplaced. The only question decided in Perez was whether a discharge in bankruptcy from an automobile tort judgment could be frustrated by a state statute requiring a judgment debtor to pay the judgment as a condition to having his driver's license reinstated. The Supreme Court found that this scheme of state regulation had the effect of undoing federal discharges in bankruptcy, and accordingly was unconstitutional. Here, by contrast, we are dealing with tariffs and regulations which are applicable to the public at large, and in no way operate to frustrate the policy of the bankruptcy law by singling out bankrupts for discriminatory treatment. Indeed, the result below would entitle debtors to more favorable treatment than that accorded to other customers of BG&E. As noted above, nearly every statutory requirement of financial responsibility or payment has a particular impact on debtors in bankruptcy or reorganization, but it cannot seriously be maintained that a bankruptcy court has the power to protect a debtor from any and all current legal responsibilities requiring a cash expenditure.

In advancing its Supremacy Clause argument, the District Court also cited a recent decision of the Fifth Circuit, In re Fontainebleau Hotel Corp., 508 F.2d 1956 (5th Cir. 1975), as well as the Third Circuit's Penn-Central decision. (JA-135). Fontainebleau is not relevant, because it involved a threat by a utility to alter terms of service unless pre-filing debts were paid. Although an attempt to obtain a preference as to pre-filing debts might raise Supremacy Clause problems, BG&E has never sought preferential payment of Grant's substantial pre-filing debts.

Finally, it must be reiterated that in Slenderella this Circuit determined that a utility may not be enjoined from enforcing its tariff rights against a bankrupt customer. No Supremacy Clause problem was found to arise from such a result.

B. Both BG&E's Right To Demand A Deposit and Its Right To Have The Reasonableness of Its Demand Determined Primarily By The Maryland Public Service Commission Are "Requirements of Valid State Law" Within Section 959(b).

BG&E's right to request a deposit for payment is fixed by both its tariffs and the regulations of the Maryland Public Service Commission. As a result of its prior legislature approval such a request carries the force of valid state law within the meaning of Section 959(b). Furthermore, under

Maryland law, all disputes relating to utility service must be brought in the first instance before the Maryland Public Service Commission, subject to review by the Maryland courts. The requirement that a debtor-in-possession's rights and obligations be determined in the proper forum is thus also a matter of "valid state law" within the meaning of Section 959(b). Judge Motley's contrary conclusions that BG&E's tariffs "merely permit" it to demand a deposit and involve only "contractual arrangements" are unfounded and erroneous; furthermore, they are irrelevant to the applicability of Section 959(b).

1. Orders of the Maryland Public Service Commission and tariffs filed thereunder have the force and effect of statutes. It is black-letter law in Maryland, as in other states, that both utility tariffs and the Public Service Commission Orders pursuant to which they are accepted for filing have the force and effect of law. The Maryland Court of Appeals, in Bosley v. Dorsey, 191 Md. 229, 60 A.2d 691 (1948) has stated:

> "...It is recognized that regulation of rates by a public service commission is a purely legislative function...Orders of the Commission issued in exercise of its statutory powers have the same force and effect as acts of the Legislature, except where limited by the statute itself or some constitutional provision" 60 A.20 at 695 [emphasis added].

Similarly, in West v. United Railway and Electric Co., 155 Md. 572, 142 A. 870 (1928), the Maryland Court of Appeals stated:

> "...[W]e will refer briefly and generally to the powers, functions and duties of the [Public Service] Commission, to the extent of its jurisdiction, and to the weight to be given to its decisions. That the power committed to the Commission is legislative in character, notwithstanding that the manner in which it is exercised is forensic, is no longer open to question [citations omitted], and except where limited by that statute itself or some constitutional provision the acts of the commission done in exercise of its statutory powers are entitled to the same weight which would be given a direct act of the legislature [citations omitted]". 142 A. at 873.

The Maryland Public Service Commission has in fact ruled expressly on BG&E's authority to require customer deposits pursuant to the tariffs at issue herein. In Short v. Baltimore Gas and Electric Company, Case No. 6007, Order No. 56211, 63 PUR 3d 493 (Md. PSC 1966), the Maryland Public Service Commission stated as follows:

> "The company's tariff on file at the time of the controversy provided, in §7.6, that the company may require from any customer or prospective customer a cash deposit intended to guarantee payment of current bills. Section 2.4 of the tariff stated that service may be refused or discontinued...for the customer's failure to provide a deposit to insure payment of bills, when requested by the Company under the provisions of 9.6....
>
> "The public service commission has for many years accepted these rules, and similar rules filed by other utility companies, as reasonable measures to protect utilities from loss and to keep rates to customers as low as possible. It appears that the rules are reasonable and a necessary promulgation of company policy, for they afford a more effective remedy than the time consuming and costly prosecution of multitudinous delinquent accounts. Customer deposits are at times required in order to protect

a utility from those customers who fail to pay their bills for past services. Otherwise all ratepayers would be burdened with the makeup of the loss of revenue". 63 PUR 3d at 496 [emphasis supplied].

2. BG&E's right to demand a deposit in its discretion is a requirement of valid state law within the meaning of Section 959(b), since the authority to require such deposits has been expressly delegated to BG&E pursuant to legislative power. Contrary to the unfounded conclusion of Judge Motley, BG&E's right to demand a deposit is not a mere "contractual arrangement," governing rights created and enforced by BG&E in its own discretion. Instead, the reasonableness of the deposit provision at issue herein has been passed upon and approved by a quasi-legislative body charged with protecting the interests of both utilities and their customers. Any element of discretion in BG&E is therefore irrelevant. It is the source of BG&E's authority, not the manner of its exercise, which controls for purposes of Section 959(b).*

BG&E cannot be analogized to a private party choosing to exercise a right it has reserved to itself by contract, precisely because its rights have been subject to prior legislative scrutiny and have thereby assumed the status of statutory requirements. The contractual relationship between a public

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* If the discretionary nature of the deposit requirement were determinative under Section 959(b), as found by the District Court, a simple revision of BG&E's tariffs eliminating such discretion would produce a vastly different result.

utility and its customers is far different from that existing between ordinary private parties. Most significantly, utility service contracts are (1) imbued with the interest of the entire ratepaying public, and (2) subject to the exclusive control of an expert body, the Maryland Public Service Commission, which by legislative action regulates the reciprocal obligations of utility and customer. As noted by the Commission in Short v. Baltimore Gas and Electric, supra, 63 PUR 3d at 496, the deposit provisions in particular are necessary to protect solvent ratepayers from bad debt expenses. Indeed, BG&E's discretion in this area is as a practical matter quite limited, since under Art. 78, §26(a), of the Annotated Code of Maryland BG&E is prohibited from providing service on different terms to customers within the same service classification.

3. BG&E's right to have the propriety and reasonableness of its deposit request determined in the proper forum is also a "requirement of valid state law." Under §77 of Article 78, Annotated Code of Maryland, any objection to a deposit demand is to be brought before the Maryland Public Service Commission. The Maryland Court of Appeals has repeatedly held that such objections must be raised initially before the Commission, subject to subsequent judicial review. Spintman v. Cheaspeake & Potomac Telephone Co., 254 Md. 423,

428, 255 A.2d 304, 307 (1969). Cf. Chesapeake & Potomac Telephone Co. v. Pincoffs, 23 Md. App. 474, 328 A.2d 78 (Md. Sp. App., 1974). Thus, regardless of the alleged "contractual" basis or discretionary nature of BG&E 's deposit request, exhaustion of statutory remedies before the Commission is an indisputable "requirement" of valid Maryland law within the meaning of Section 959(b). Accordingly, the Bankruptcy Court violated that statute by arrogating to itself the exclusive power to determine the amount of deposit to be paid by Grant.

III. THIS APPEAL IS NOT MOOT

The District Court properly rejected Grant's contention that this appeal had become moot as a result of Judge Galagay's order to liquidate of February 13. Judge Motley expressly found that BG&E's right to demand a security deposit from a customer under the protection of a bankruptcy court "presents an issue which is capable of repetition yet evading review." (JA-140). Judge Motley thus recognized that BG&E is potentially faced with the same threat of bankruptcy court injunction each time it seeks a security deposit from a debtor in bankruptcy, reorganization or arrangement proceedings. Since the debtor is generally either rehabilitated or liquidated within a relatively brief time, strict application of the

mootness doctrine would frustrate BG&E's right to litigate its strong objection to the asserted jurisdiction of the Bankruptcy Court.

The Supreme Court has long recognized that mootness principles must be applied with sufficient flexibility to insure effective appellate review of controversies which are frequently recuring but necessarily short-lived. This policy in favor of hearing cases which are "capable of repetition, yet evading review" was set forth originally in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911). There the Court refused to dismiss an appeal from an order of the Interstate Commerce Commission despite the fact that the order had expired pending appeal, stating:

> "The question[s] involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress." 219 U.S. at 515

This doctrine has been applied repeatedly in recent years to insure that no litigant is foreclosed from fully litigating a claim due to the necessarily deliberate pace of appellate review. For example, in Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974), a case cited by the District Court below (JA-140), the Supreme Court refused to

dismiss as moot an employer's challenge to a state policy making striking employees eligible for welfare payments, despite the fact that the particular strike on which the plaintiff employer's injury was based had ended long before the litigation reached the Supreme Court. The Court found that the dispute was of a type that is evasive of review, even though some strikes are lengthy enough to permit appellate review prior to their termination. The Court emphasized the plaintiff's right to full review of ". . . policies that have had their impact and that continue in force, unabated and unreviewed." (418 U.S. at 126-127).

A similar claim of mootness has been decided against a bankrupt in a nearly identical context in In Re Security Investment Properties, Inc., Nos. B74-2506A and B74-2507A (N.D. Ga., December 8, 1975), an opinion cited by Grant below. In the Security Investment case, Georgia Power Company appealed to the District Court from an order of the Bankruptcy Judge which enjoined the utility from requiring a security deposit or terminating service as a result of its nonpayment. On appeal, the debtor argued that the case was moot, on the grounds that since the debtor had been adjudicated a bankrupt two months earlier, Georgia Power had no further need of a security deposit.

The Court in Security Investment, like the District Court in the instant case, found that the case was "capable

of repetition, yet evading review" under Southern Pacific and Super Tire, and therefore not moot. The Court concluded as follows:

> "[F]rom past experiences recounted by appellant in its brief, it is also apparent that a substantial number of the Chapter XI proceedings initiated in this district are, indeed, short-lived and terminated by an adjudication of bankruptcy. If mere adjudication of bankruptcy relegates appellant's asserted rights moot, it is, therefore, clear that Georgia Power would be effectively precluded from obtaining judicial review of the bankruptcy judge's order." Slip Opinion, p. 8.

In this case, BG&E is the victim of a pervasive policy of the Bankruptcy Court which "continue[s] in force, unabated and unreviewable". The authority of a bankruptcy court to issue short-term orders affecting a utility which is forced to deal with a debtor pending its rehabilitation or liquidation is truly an issue which is "capable of repetition, yet evading review." If this case is found moot, BG&E will be effectively relegated to a procedural limbo; as a result, BG&E will be repeatedly subject to orders which it believes are illegal, but which regularly expire prior to final appellate review. This Court therefore has an obligation to exercise its discretion to insure BG&E a hearing on the fundamental jurisdictional issues it has raised.

CONCLUSION

For the foregoing reasons, the District Court's Order of February 20, 1976 should be reversed and the Bankruptcy Court's Orders of October 2 and October 20, 1975 affirmed therein should be vacated, insofar as they 1) prohibit BG&E from seeking a deposit in an amount permitted by its tariffs, and 2) prohibit BG&E from terminating service to Grant in the event of non-payment.

Respectfully submitted,

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Dated: April 30, 1976
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CERTIFICATE OF SERVICE

I hereby certify that the attached Brief of Petitioner-Appellant, Baltimore Gas and Electric Company, has been served by mailing true copies thereof to Wachtell, Lipton, Rosen & Katz, Attorneys for Respondent-Appellee W.T. Grant Company, 299 Park Avenue, New York, New York 10017.

Dated: New York, New York
April 30, 1976

Craig A. Seledee